

# **CONTINUATION OF EMERGENCY RULE 22**

## **DEPARTMENT OF INSURANCE OFFICE OF THE COMMISSIONER**

### **TITLE 37 INSURANCE**

#### **LAC 37: PART XI, CHAPTER 41: EMERGENCY RULE 22**

#### **ALTERNATIVE PROCEDURES FOR THE RESOLUTION OF DISPUTED RESIDENTIAL INSURANCE CLAIMS ARISING FROM HURRICANE DAMAGE**

#### **SPECIFIC REASONS FOR FINDING A CONTINUATION OF THE DANGER TO THE PUBLIC HEALTH, SAFETY OR WELFARE:**

The Department of Insurance (Department) hereby states that the following circumstances continue to constitute an immediate danger to the public health, safety, or welfare: The 2005 hurricane season was particularly destructive for Louisiana. Hurricane Katrina caused catastrophic damage in southeast and central Louisiana; particularly hard were Plaquemines, St. Bernard and Orleans parishes. Katrina caused widespread major damage to homes, loss of personal belongings and corresponding temporary loss of employment.

On September 24, 2005, Hurricane Rita hit the Cameron Parish area of Louisiana's southwest coast causing extensive and wide spread damage. The Governor of Louisiana declared a state of emergency (Proclamation No. 48 KKB 2005 and Proclamation No. 53 KKB 2005) due to the effects of Hurricanes Katrina and Rita, respectively. The President of the United States declared designated parishes of Louisiana a federal disaster area by issuing FEMA-1603-DR and FEMA-1607-DR for Katrina and Rita, respectively.

The total cost of property losses resulting from the combination of storms has been estimated to be in the tens of billions of dollars. The initial issuance of this Emergency Rule, in January 2006 (LA Register, January 2006, Volume 32, page 60) complied with Code Title XIX – Alternative Dispute Resolution, particularly Chapter 1, The Louisiana Mediation Act, R.S. 9:4101 et seq., and implemented a non-adversarial alternative dispute resolution procedure. The facilitated

claim resolution conference was prompted by the critical need for effective, fair, and timely handling of personal lines insurance claims arising out of damage to residential property caused by these two hurricanes.

Since the program's inception more than 3500 Louisiana homeowners have requested to have their property claim mediated. Despite this success, now eight months after the hurricanes it is estimated that hundreds of thousands of residential property claims remain unresolved and repairs to damaged property has not been completed. Many of these claims remain unresolved as a result of disputes regarding costs of labor and materials needed to effectuate repairs. Due to the unprecedented extent of damage, in many instances materials and labor necessary to effectuate repairs have not been readily available and there have been disparities between the estimates of insurers and repair contractors.

Insureds with unresolved claims and un-repaired residences continue to be exposed to emotional, physical and economic hardship and remain at risk. Insureds are at risk of receiving sub-quality work, or being faced with a substantial disparity between repair estimates and customary costs in the area. This condition erodes the ability of insureds to realize the benefit of their insurance coverage. This Rule establishes a procedure to determine a construction pricing guideline to be used in mediation proceedings to determine reasonable payments for repair and replacement costs arising from damage caused by hurricanes Katrina and Rita.

Further, the apparent one year prescriptive period for claims of these types (R.S. 22: 691) is fast approaching. Continuation of the program at this time will allow homeowners the ability to resolve claims without having to file suit.

Based upon the forgoing, the Department has determined that an emergency continues to exist and continuation of the claims mediation program and the availability of guidelines for construction pricing are essential to the resolution of insurance claims and the effectuation of repairs of damage covered by insurance policies.

## **SUMMARY OF THE RULE**

This Emergency Rule establishes a special mediation program for personal lines residential insurance claims resulting from Hurricanes Katrina and Rita. The rule creates procedures for notice of the right to mediation, request for mediation, assignment of mediators, payment for mediation, conduct of mediation, and guidelines for the quality repair of residential property damage.

The person to be contacted regarding the Emergency Rule is: Barry E. Ward, Senior Attorney, Division of Legal Services, Department of Insurance, P.O. Box 94214, Baton Rouge, LA 70804-9412; 225-219-4750.

## **TITLE 37 INSURANCE**

### **Part XI. EMERGENCY RULE**

#### **Chapter 41    RULE 22**

### **Alternative Procedures for the Resolution of Disputed Residential Insurance Claims Arising From Hurricane Damage**

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**Section 4101. Authority.**

A. This Emergency Rule is promulgated by the Commissioner of Insurance pursuant to authority granted under the Louisiana Insurance Code, Title 22; R.S.- 22:1 et seq.,

AUTHORITY NOTE: Promulgated in accordance with R.S.22:3, and the Administrative Procedure Act, R.S. 49:950 et seq.

HISTORICAL NOTE: Promulgated by the Department of Insurance, Office of the Commissioner, LR 32:

**Section 4103. Purpose and Scope.**

A. This Emergency Rule in compliance with the Louisiana Mediation Act, R.S. 9:4101 et seq., sets forth a non-adversarial alternative dispute resolution procedure for a facilitated claim resolution conference prompted by the critical need for effective, fair, and timely handling of personal lines insurance claims arising out of damages to residential property caused by hurricanes Katrina and Rita.

B. This Emergency Rule also addresses guidelines for the quality repair of residential property damaged by Hurricanes Katrina and Rita at reasonable and fair prices.

C. Before resorting to these procedures, insureds and insurers are encouraged to resolve claims as quickly and fairly as possible.

D. The procedure established by this Emergency Rule is available to all first party claimants who have personal lines claims resulting from damage to residential property occurring in the State of Louisiana. This rule does not apply to commercial insurance, private passenger motor vehicle insurance or to liability coverage contained in property insurance policies.

AUTHORITY NOTE: Promulgated in accordance with R.S.22:3, and the Administrative Procedure Act, R.S. 49:950 et seq.

HISTORICAL NOTE: Promulgated by the Department of Insurance, Office of the Commissioner, LR 32:

**Section 4105. Definitions.** The following definitions apply to the terms of this rule as used herein.

*Administrator* - the Department or its designee (American Arbitration Association) and the term is used interchangeably with regard to the Department's duties under this rule .

*Claim* - any matter on which there is a dispute or for which the insurer has denied payment pursuant to claims arising from Hurricanes Katrina and Rita only. Unless the parties agree to mediate a claim involving a lesser amount, a "claim" involves the insured requesting \$500 or more to settle the dispute, or the difference between the positions of the parties is \$500 or more. "Claim" does not

include a dispute with respect to which the insurer has reported allegations of fraud, based on an investigation by the insurer's special investigative unit, to the Department's Division of Insurance Fraud.

*Department* - the Department of Insurance or its designee. Reporting to the Department shall be directed to: Department of Insurance, Mediation Section, P.O. Box 94214, Baton Rouge, LA, 70804-9214; or by facsimile to (225) 342-1632.

*Mediator* - an individual approved by the Administrator to mediate disputes pursuant to this rule. In order to be approved, mediators must appear on the "approved register" of mediators maintained by the Alternative Dispute Resolution (ADR) section of the Louisiana State Bar Association pursuant to R.S. 9:4105, or provide sufficient evidence of having completed the mandatory qualifications set forth in R.S. 9:4106.

*Party or Parties* - the insured and his or her insurer, including Citizens Property Insurance Corporation, when applicable.

AUTHORITY NOTE: Promulgated in accordance with R.S.22:3, and the Administrative Procedure Act, R.S. 49:950 et seq.

HISTORICAL NOTE: Promulgated by the Department of Insurance, Office of the Commissioner, LR 32:

#### **Section 4107. Notification of Right to Mediate.**

A. Insurers shall notify each of their insureds in this state, who has claimed damage to their residential property as a result of either Hurricane Katrina or Hurricane Rita, of their right to mediate the claim settlement. This requirement applies to all claims including any and all instances where checks have been issued by the insurer to the homeowner.

B. The insurer shall mail a notice of the right to mediate disputed claims to the insured within 5 days of the time the policyholder or the Administrator notifies an insurer of a dispute regarding the policyholder's claim. The following shall apply:

1. If the insurer has not been notified of a disputed claim prior to the time an insurer notifies the insured that a claim has been denied in whole or in part, the insurer shall mail a notice of the right to mediate disputed claims to the insured in the same mailing as a notice of denial.

2. The insurer is not required to send a notice of the right to mediate disputed claims if a claim is denied because the amount of the claim is less than the policyholder's deductible.

3. The mailing that contains the notice of the right to mediate may include the Department's consumer brochure on mediation.

4. Notification shall be in writing and shall be legible, conspicuous, and printed in at least 12-point type.

5. The first paragraph of the notice shall contain the following statement: "J. Robert Wooley, Commissioner of Insurance for the State of Louisiana, has adopted an Emergency Rule to facilitate fair and timely handling of residential property insurance claims arising out of hurricanes Katrina and Rita that recently devastated so many homes in Louisiana. The Emergency Rule gives you the right to attend a mediation conference with your insurer in order to settle any dispute you have with your insurer about your claim. You can start the mediation process by calling the Mediation Administrator, the American Arbitration Association (AAA), at 1-800-426-8792. An independent mediator, who has no connection with your insurer, will be in charge of the mediation conference."

C. The notice shall also:

1. Include detailed instructions on how the insured is to request mediation, including name, address, and phone and fax numbers for requesting mediation through the Administrator;

2. Include the insurer's address and phone number for requesting additional information; and

3. State that the Administrator will select the mediator.

AUTHORITY NOTE: Promulgated in accordance with R.S.22:3, and the Administrative Procedure Act, R.S. 49:950 et seq.

HISTORICAL NOTE: Promulgated by the Department of Insurance, Office of the Commissioner, LR 32:

#### **Section 4109. Request for Mediation.**

A. An insured may request mediation by contacting the insurer or by writing to the American Arbitration Association, Mediation Section, 1100 Poydras Street, Suite 2725, New Orleans, LA 70163; by calling the Administrator at 1-800-426-8792; or by faxing a request to the Administrator at (504) 561-8041.

B. If an insured requests mediation *prior to* receipt of the notice of the right to mediation or if the date of the notice cannot be established, the insurer shall be notified by the Administrator of the existence of the dispute prior to the Administrator processing the insured's request for mediation.

C. If an insurer receives a request for mediation, the insurer shall fax the request to the Mediation Administrator within 3 business days of receipt of the request. Should the Department receive any requests, it will forward those requests to the Administrator within 3 business days following the receipt. The Administrator shall notify the insurer within 48 hours of receipt of requests filed with the Department. The insured should provide the following information if known:

1. Name, address, and daytime telephone number of the insured and location of the property if different from the address given;
2. The claim and policy number for the insured;
3. A brief description of the nature of the dispute;
4. The name of the insurer and the name, address, and phone number of the contact person for scheduling mediation;
5. Information with respect to any other policies of insurance that may provide coverage of the insured property for named perils such as flood or windstorm.

AUTHORITY NOTE: Promulgated in accordance with R.S.22:3, and the Administrative Procedure Act, R.S. 49:950 et seq.

HISTORICAL NOTE: Promulgated by the Department of Insurance, Office of the Commissioner, LR 32:

#### **Section 4111. Mediation Costs.**

- A. All mediation costs shall be borne by the insurer. The cost shall be \$350.00 regardless of where the property is located.
- B. Within 5 days of receipt of the request for mediation from the insured or receipt of notice of the request from the Department or immediately after receipt of notice from the Administrator pursuant to Section 4009 that mediation has been requested, whichever occurs first, the insurer shall pay a non-refundable administrative fee, not to exceed \$100.00 as determined by the Department, to the Administrator to defer the expenses of the Administrator and the Department.
  1. The insurer shall pay \$250.00 to the Administrator for the mediator's fee not later than 5 days prior to the date scheduled for the mediation conference.
  2. If the mediation is cancelled for any reason more than 72 hours prior to the scheduled mediation time and date, the insurer shall pay \$75.00 to the Administrator for the mediator's fee instead of \$250.00.
  3. No part of the fee for the mediator shall be refunded to the insurer if the conference is cancelled within 72 hours of the scheduled time.

AUTHORITY NOTE: Promulgated in accordance with R.S.22:3, and the Administrative Procedure Act, R.S. 49:950 et seq.

HISTORICAL NOTE: Promulgated by the Department of Insurance, Office of the Commissioner, LR 32:

**Section 4113.           Scheduling of Mediation.**

A.     The Administrator will select a mediator and schedule the mediation conference. The Administrator will attempt to facilitate reduced travel and expense to the parties and the mediator when selecting a mediator and scheduling the mediation conference. The Administrator shall confer with the mediator and all parties prior to scheduling a mediation conference. The Administrator shall notify each party in writing of the date, time and place of the mediation conference at least 10 days prior to the date of the conference and concurrently send a copy of the notice to the Department.

AUTHORITY NOTE: Promulgated in accordance with R.S.22:3, and the Administrative Procedure Act, R.S. 49:950 et seq.

HISTORICAL NOTE: Promulgated by the Department of Insurance, Office of the Commissioner, LR 32:

**Section 4115.           Conduct of the Mediation Conference.**

A.     R.S. 9:4101.C.(4) provides "Mediation" is a procedure in which a mediator facilitates communication between the parties concerning the matters in dispute and explores possible solutions to promote reconciliation, understanding, and settlement. As such, it is not necessary to involve a private attorney and participation by private attorneys is discouraged by the Department. However:

1.     If the insured elects to have an attorney participate in the conference, the insured shall provide the name of the attorney to the Administrator at least six days before the date of the conference.

2.     Parties and their representatives must conduct themselves in the cooperative spirit of the intent of the law and this rule.

3.     Parties and their representatives must refrain from turning the conference into an adversarial process.

4.     Both parties must negotiate in good faith. A decision by an insurer to stand by a coverage determination shall not be considered a failure to negotiate in good faith. A party will be determined to have not negotiated in good faith if the party or a person participating on the party's behalf, continuously disrupts, becomes unduly argumentative or adversarial, or otherwise inhibits the negotiations as determined by the mediator.

5.     The mediator shall terminate the conference if the mediator determines that either party is not negotiating in good faith, either party is unable or unwilling to participate meaningfully in the process, or upon mutual agreement of the parties.



6. The party responsible for causing termination shall be responsible for paying the mediator's fee and the administrative fee for any rescheduled mediation.

B. Upon request of the insured or the mediator, an attorney will be available to help insureds prepare for the mediation conferences. A representative of the Department will be present at and participate in the conference if requested at least 5 days prior to the scheduled mediation by a party or the mediator to offer guidance and assistance to the parties. The Department will attempt to have a representative at the conference if the request is received less than 5 days prior to the scheduled mediation. Representatives of the Department that participate in the conference will not be there to represent the insured. They shall not assume an advocacy role but shall be available to provide legal and technical insurance information.

C. The representative of the insurer attending the conference must bring a copy of the policy and the entire claims file to the conference.

1. The representative of the insurer attending the conference must know the facts and circumstances of the claim and be knowledgeable of the provisions of the policy.

2. An insurer will be deemed to have failed to appear if the insurer's representative lacks authority to settle the full amount of the claim or lacks the ability to disburse the settlement amount at the conclusion of the conference.

D. The mediator will be in charge of the conference and will establish and describe the procedures to be followed. Per R.S. 9: 4107, mediators shall conduct the conference in accordance with the standards of professional conduct for mediation adopted by the American Arbitration Association, the American Bar Association, and the Society of Professionals in Dispute Resolution.

1. Each party will be given an opportunity to present their side of the controversy. In so doing, parties may utilize any relevant documents and may bring any individuals with knowledge of the issues, such as adjusters, appraisers, or contractors, to address the mediator.

2. The mediator may meet with the parties separately, encourage meaningful communications and negotiations, and otherwise assist the parties to arrive at a settlement.

3. All statements made and documents produced at a settlement conference shall be deemed settlement negotiations in anticipation of litigation. The provisions of R.S. 9:4112 apply.

E. A party may move to disqualify a mediator for good cause at any time. The request shall be directed to the Administrator if the grounds are known prior to the mediation conference. Good cause consists of conflict of interest between a party and the mediator, inability of the mediator to handle the conference competently, or other reasons that would reasonably be expected to impair the conference.

F. If the insured fails to appear, without good cause as determined by the Administrator, the insured may have the conference rescheduled only upon the insured's payment of the mediation fees for the rescheduled conference. If the insurer fails to appear at the conference, without good cause as determined by the Administrator, the insurer shall pay the insured's actual expenses incurred in attending the conference and shall pay the mediator's fee whether or not good cause exists.

1. Failure of a party to arrive at the mediation conference within 30 minutes of the conference's starting time shall be considered a failure to appear.

2. Good cause shall consist of severe illness, injury, or other emergency which could not be controlled by the insured or the insurer and, with respect to an insurer, could not reasonably be remedied prior to the conference by providing a replacement representative or otherwise.

3. If an insurer fails to appear at conferences with such frequency as to evidence a general business practice of failure to appear, the insurer shall be subject to penalty, including suspension, revocation, or fine for violating R.S. 22:1214(14)(b), (c), (f), et seq.

AUTHORITY NOTE: Promulgated in accordance with R.S.22:3, and the Administrative Procedure Act, R.S. 49:950 et seq.

HISTORICAL NOTE: Promulgated by the Department of Insurance, Office of the Commissioner, LR 32:

#### **Section 4117. Guidelines for the Quality Repair of Residential Property at a Reasonable and Fair Price.**

A. The provisions of insurance policies and applicable statutes require claims payments made by insurers to be sufficient to effectuate required repairs at the property site. Further, misrepresentation by any person regarding the cost of repairs is prohibited.

B. Based upon information provided by the construction industry, the insurance industry and nationally recognized sources, companies such as Simsol, Inc. and Xactware, Inc., compile construction pricing guidelines used in adjusting property losses. These guidelines reflect data from both the construction and insurance industries and the ranges take into consideration price differentials between geographic areas of the state. The parties shall use the current construction pricing guidelines compiled by these or similar reputable sources as the starting point in the dispute resolution process.

C. The guidelines referred to herein do not apply to any portion of repairs necessary to fulfill the insurer's contractual obligation to restore the insured residence to pre-hurricane condition where, as of the effective date of this rule, there is an executed repair contract to effectuate such repairs for an agreed price and the insurer has tendered full payment for the repair contract amount for those repairs.

AUTHORITY NOTE: Promulgated in accordance with R.S.22:3, and the Administrative Procedure Act, R.S. 49:950 et seq.

HISTORICAL NOTE: Promulgated by the Department of Insurance, Office of the Commissioner, LR 32:

#### **Section 4119. Post Mediation.**

A. Within 5 days of the conclusion of the conference the mediator shall file with the Administrator a mediator's status report on Form DOI-HM-1 which is entitled *Disposition of Property Insurance Mediation Conference*, indicating whether or not the parties reached a settlement. Form DOI-HM-1 will be available from the Administrator and is hereby incorporated in this rule by reference.

1. Mediation is non-binding unless all the parties specifically agree otherwise in writing.

2. If the parties reached a settlement, the mediator shall include a copy of the settlement agreement with the status report.

3. However, if a settlement is reached, the insured shall have 3 business days within which he or she may rescind any settlement agreement provided that the insured has not cashed or deposited any check or draft disbursed to him or her for the disputed matters as a result of the conference.

B. If a settlement agreement is reached and is not rescinded, it shall act as a release of all specific claims that were presented in the conference. Any additional claims under the policy shall be presented a separate claim.

AUTHORITY NOTE: Promulgated in accordance with R.S.22:3, and the Administrative Procedure Act, R.S. 49:950 et seq.

HISTORICAL NOTE: Promulgated by the Department of Insurance, Office of the Commissioner, LR 32:

#### **Section 4121. Non- participation in mediation program.**

A. If the insured decides not to participate in this claim resolution process or if the parties are unsuccessful at resolving the claim, the insured may choose to proceed under the appraisal process set forth in the insured's insurance policy, by litigation, or by any other dispute resolution procedure available under Louisiana law.

AUTHORITY NOTE: Promulgated in accordance with R.S.22:3, and the Administrative Procedure Act, R.S. 49:950 et seq.

HISTORICAL NOTE: Promulgated by the Department of Insurance, Office of the Commissioner, LR 32:

**Section 4123. Departmental Authority to Designate.**

A. The Department is authorized to designate an entity or person as its Administrator to carry out any of the Department's duties under this rule.

AUTHORITY NOTE: Promulgated in accordance with R.S.22:3, and the Administrative Procedure Act, R.S. 49:950 et seq.

HISTORICAL NOTE: Promulgated by the Department of Insurance, Office of the Commissioner, LR 32:

**Section 4125. Severability.**

A. If a court holds any section or portion of a section of this Emergency Rule or the applicability thereof to any person or circumstance invalid, the remainder of the Emergency Rule shall not be affected thereby.

AUTHORITY NOTE: Promulgated in accordance with R.S.22:3, and the Administrative Procedure Act, R.S. 49:950 et seq.

HISTORICAL NOTE: Promulgated by the Department of Insurance, Office of the Commissioner, LR 32:

**Section 4127. Applicable Provisions.**

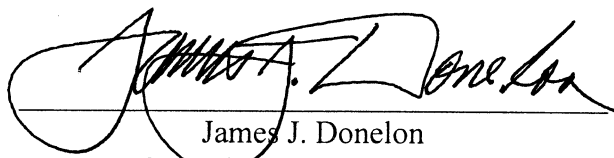
A. The applicable provisions of Title 49, Louisiana Administrative Procedure Act, shall govern issues relating to mediation that are not addressed in this rule. The provisions of this Emergency Rule shall govern in the event of any conflict with the provisions of Title 49, Louisiana Administrative Procedure Act.

AUTHORITY NOTE: Promulgated in accordance with R.S.22:3, and the Administrative Procedure Act, R.S. 49:950 et seq.

HISTORICAL NOTE: Promulgated by the Department of Insurance, Office of the Commissioner, LR 32:

Re-issued this 25th day of April, 2006.

To become effective on the 1st day of May 2006.

  
James J. Donelon  
Commissioner of Insurance